RECORD AND BRIEFS

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SUPREME COURT U.S.

No. 16-499

In the
Supreme Court of the United States

JOSEPH JESNER, ET AL.,
Petitioners,

v.

ARAB BANK, PLC.,
Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Second Circuit

BRIEF OF CANADIAN INTERNATIONAL AND NATIONAL SECURITY LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. Canada Has Enacted Domestic Legislation Criminalizing the Financing of Terrorism Pursuant to Its Obligations Under the International Convention for the Suppression of the Financing of Terrorism (Terrorism Financing Convention) 5

A. The Terrorism Financing Convention Requires State Parties to Enact Legislation Criminalizing the Funding of Terrorism. 5

B. Canada Has Ratified and Implemented the Terrorism Financing Convention though Its Anti-Terrorism Act. 6

C. Canadian Law Incorporates Canada's Treaty Obligations into Domestic Law. 7

II. The Prohibition Against Financing Terrorism is Customary International Law, Actionable in Canadian Courts. 11

A. Source of Customary International Law 11

B. Customary International Law Prohibits the Financing of Terrorism. 12

C. Canadian Courts Enforce Customary International Law 17

D. A Civil Suit against a Corporation for Violations of the Terrorism Financing Convention Could be Brought in Canadian Courts Based on Customary International Law. 20

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Page(s)

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Re Foreign Legations, [1943] S.C.R. 208 (Can.) ... 18

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Schreiber v. Canada (Attorney General), [2002] 3 S.C.R. 269 (Can.) 10

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the Continental Shelf, *opened for signature* Mar. 10 1998, 1678 U.N.T.S. 201 12

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INTEREST OF THE AMICI CURIAE

Amici are the following international law and national security law scholars, who possess an acute interest in the relationship between international and domestic law and the civil liability of legal entities for violations of customary international law.[1]

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[1] Counsel for all parties have submitted blanket consent to the filing of amicus briefs in this case. No counsel for a party authored this brief in whole or in part. No person or entity other than *amici curiae* or their counsel made a monetary contribution that was intended to fund the preparation or submission of this brief.

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SUMMARY OF ARGUMENT

The prohibition against financing terrorism is a rule of customary international law and gives rise to a civil cause of action in Canadian courts.

The prohibition against financing terrorism is also both a rule of treaty law and a central component of the customary international law norm prohibiting terrorism.

The Terrorism Financing Convention entered into force in April 2002. International Convention for the Suppression of the Financing of Terrorism, Feb. 10, 2000, Can. T.S. No. 2002/9, 2178 U.N.T.S. 197 (entered into force Apr. 10, 2002). Canada ratified the Convention in February 2002 and enacted the Anti-Terrorism Act, fulfilling its Convention obligations to criminalize terrorist financing. Anti-terrorism Act, S.C. 2001, ch. 41 (Can.). The Criminal Code and the Proceeds of Crime (Money Laundering) and Terrorist Financing Act provide for criminal liability and criminal sanctions for legal entities that transgress these laws. *See* Criminal Code, R.S.O. 1985, ch. C-46, § 83 (Can.); Proceeds of Crime (Money Laundering) and

Terrorist Financing Act, S.C. 2000, ch. 17 (Can.) The Criminal Code also provides for the seizure and restraint of assets located both inside and outside Canada where property is owned or controlled by or on behalf of a terrorist group, or where such property has been or will be used to facilitate or carry out a terrorist activity. Criminal Code, R.S.O. 1985, ch. C-46, §§ 83.13-83.14 (Can.). No criminal conviction is necessary.

While the Anti-Terrorism Act does not expressly establish a civil cause of action for financing terrorism, Canada has done so in separate legislation.[2]

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[2] Canada enacted the Justice for Victims of Terrorism Act, S.C. 2012, ch.1, § 2 (Can.) [hereinafter JVTA] which provides a civil cause of action for financing terrorism. The JVTA finds that "United Nations Security Council Resolution 1373 (2001) reaffirms that acts of international terrorism constitute a threat to international peace and security." *Id.* (citing S.C. Res. 1373, pmbl. (Sept. 28, 2001)). Canada ratified the Terrorism Financing Convention on February 15, 2002; and "terrorism is dependent on financial and material support." JVTA pmbl. As stated in the legislation, "[t]he purpose of this Act is to deter terrorism by establishing a cause of action that allows victims of terrorism to sue perpetrators of terrorism and their supporters." *Id.* § 3. While limited in scope, this express cause of action applies to "any person that has suffered loss of damages in or outside Canada on or after January 1, 1985 as a result of an act or omission that is, or had it been committed in Canada would be, punishable under Part II.1 of the Criminal Code", including aliens. *Id.* § 4(1). Such actions are limited to those where "the action has a real and substantial connection to Canada or the plaintiff is a Canadian citizen or a permanent resident" as defined under Canadian law. *Id.* § 4(2).

Even where treaty obligations are not expressly implemented through legislation, Canadian courts will presume that Canadian law complies with Canada's international law obligations unless Parliament clearly indicates that a treaty does not apply.

The prohibition against financing terrorism is customary international law, actionable in Canada. Customary international law is a binding source of international law rooted in state practice and a state's belief that they have a legal obligation. Numerous international and regional treaties, including the Terrorism Financing Convention, as well as UN Resolutions and consistent state practice are evidence that the prohibition against terrorism has crystalized as customary international law. The prohibition against financing terrorism is an integral component of the customary international law norm prohibiting terrorism and is therefore itself customary international law. Customary international law obligations are automatically incorporated into the common law of Canada and Canadian courts have found that customary international law may give rise to a civil cause of action.

Therefore, although Canadian legislation implementing Canada's obligations under the Terrorism Financing Convention, does not expressly establish a civil cause of action, plaintiffs who have suffered harm caused by a corporation involved in financing terrorist acts could bring a civil action against such an entity in Canadian courts based in customary international law.

ARGUMENT

I. CANADA HAS ENACTED DOMESTIC LEGISLATION CRIMINALIZING THE FINANCING OF TERRORISM PURSUANT TO ITS OBLIGATIONS UNDER THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM (TERRORISM FINANCING CONVENTION)

A. The Terrorism Financing Convention Requires State Parties to Enact Legislation Criminalizing the Funding of Terrorism.

The United Nations General Assembly adopted the Terrorism Financing Convention on December 9, 1999 and the treaty entered into force on April 10, 2002. International Convention for the Suppression of the Financing of Terrorism, Feb. 10, 2000, Can. T.S. No. 2002/9, 2178 U.N.T.S. 197 (entered into force Apr. 10, 2002) [hereinafter Terrorism Financing Convention]. As of June 1, 2017, there are 188 state parties to the Convention.

The Terrorism Financing Convention seeks to "dry-up" terrorist funding. Pierre Klein, *International Convention for the Suppression of the Financing of Terrorism* 1 (United Nations Audiovisual Library of International Law 2009), http://legal.un.org/avl/pdf/ha/icsft/icsft_e.pdf. It criminalizes the act of providing funds with the intention or knowledge that these funds will be used to carry out a terrorist offense or serious bodily harm to civilian populations. Terrorism Financing Convention art. 2. It also requires state parties to criminalize these acts in domestic law. *Id.* art. 4. Article 5 of the Terrorism Financing Convention specifically requires state parties to provide for

criminal, civil, or administrative liability of legal persons involved in financing terrorism and to ensure such entities face effective, proportionate, dissuasive criminal, civil, or administrative sanctions. *Id.* arts. 5(1), (3). The Convention further requires state parties to prosecute natural or legal persons within their territory or (in the case of natural persons) to extradite such persons to another state party with the jurisdiction to prosecute. *Id.* art. 7(4).

B. Canada Has Ratified and Implemented the Terrorism Financing Convention though Its Anti-Terrorism Act.

Canada signed the Terrorism Financing Convention on February 10, 2000, and ratified on February 19, 2002. To meets its obligations under the Convention, the Canadian Federal government enacted the Anti-Terrorism Act. Anti-terrorism Act, S.C. 2001, ch. 41 (Can.). This legislation amended the Criminal Code and the Proceeds of Crime (Money Laundering) Act[3] to criminalize terrorist financing in Canadian domestic law, making explicit reference to Canada's obligations under the Terrorism Financing Convention. Anti-terrorism Act, S.C. 2001, ch. 41, §§ 2-23, 47-75 (Can.); *see also* Criminal Code, R.S.O. 1985, ch. C-46 (Can.); Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, ch. 17 (Can.) [hereinafter PCTFA]. The Criminal Code definition of 'terrorist activity' references the Terrorism

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[3] The amendments renamed the Act to be The Proceeds of Crime (Money Laundering) and Terrorism Financing Act.

Financing Convention and its eight annexed terrorism treaties, Criminal Code, R.S.O. 1985, ch. C-46, § 83.01(1)(a) (Can.), and makes financing terrorism a criminal offense punishable by imprisonment. *Id.* § 3(c). The newly named Proceeds of Crime (Money Laundering) and Terrorist Financing Act explicitly lists as one of its objectives fulfilling Canada's international commitments to fight terrorist activity PCFTA §3(c) While the Criminal Code and PCTFA provide for criminal liability and criminal sanctions for legal entities that transgress these laws, no domestic legislation provides a specific cause of action establishing civil liability of legal entities for the financing of terrorism. PCTFA §§ 2, 5; Criminal Code, R.S.O. 1985, ch. C-46, §§ 22.1, 22 (Can.).

The Criminal Code, however, provides for the seizure and restraint of assets located both inside and outside Canada where, on an *ex parte* application by the Attorney General to the Federal Court, a judge is satisfied on a balance of probabilities that such property is "(a) property owned or controlled by or on behalf of a terrorist group; or (b) property that has been or will be used, in whole or in part, to facilitate or carry out a terrorist activity". Criminal Code, R.S.O. 1985, ch. C-46, §§ 83.13-83.14 (Can.). No criminal conviction is necessary.

C. Canadian Law Incorporates Canada's Treaty Obligations into Domestic Law.

Treaties, agreements between states, are a primary source of international law. Statute of the International Court of Justice art. 38(1)(a), June 26,

1945, 1945 Can. T.S. No. 7, 33 U.N.T.S. 993. Unlike customary international law, which is universally binding, treaties only apply to states parties to the agreement. Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1980 Can. T.S. No. 37, 1155 U.N.T.S. 331 [hereinafter VCLT]. Ratification of a treaty signifies a willingness and ability on the part of a state to fulfill its treaty obligations. Armand de Mestral & Evan Fox Decent, *Rethinking the Relationship between International and Domestic Law*, 63 McGill L.J. 573, 578 (2008). In essence, treaties are contractual arrangements between states. The Vienna Convention on the Law of Treaties ("VCLT"), to which Canada is party, and which is widely considered a codification of the relevant rules of customary international law,[4] requires states to act in good faith to fulfill their treaty obligations. VCLT art. 26. Further, neither domestic law nor politics can justify a state's failure to fulfill its treaty obligations. *Id.* art. 27. The VCLT, therefore, codifies Canada's legal duty to implement and uphold the treaties it ratifies. Armand de Mestral & Evan Fox Decent, *Rethinking the Relationship between International and Domestic Law*, 63 McGill L.J. 573, 600 (2008).

Canada takes a dualist approach to its domestic incorporation of international treaty obligations, meaning federal and provincial

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[4] *See, e.g.*, Armand de Mestral & Evan Fox Decent, *Rethinking the Relationship between International and Domestic Law*, 63 McGill L.J. 573, 600 (2008); Ian Brownlie, *Principles of Public International Law* 603 (James Crawford, ed., 8th ed. 2012); John Currie, *Public International Law* 126 (2001).

legislatures must enact legislation to implement treaty provisions. Michel Bastarache, *How Internationalization of the Law Has Materialized in Canada*, 59 U. New Brunswick L.J. 190, 193 (2009); Louise Arbour & Fannie Lafontaine, *Beyond Self-Congratulations: the Charter at 15 in an International Perspective*, 45 Osgoode Hall L.J. 239, 259 (2007). Canada's main treaty implementation methods are either (1) incorporation of the treaty text, in whole or in part, into domestic legislation; or, (2) enacting/amending legislation to reflect the obligations set out in the treaty provisions. Ruth Sullivan, *Sullivan on the Construction of Statutes* ¶¶ 18.37-18.38 (6th ed. 2014). If, however, Canada's legislative framework already aligns with the treaty, no further steps are needed to incorporate the treaty into Canadian law. Elizabeth Brandon, *Does International Law Mean Anything in Canadian Courts?*, J. Envtl. L. & Prac. 399, 403 (2001). To determine whether Canada has implemented a treaty, therefore, one must assess the treaty's obligations and determine whether domestic law fulfills those requirements. *Id.* at 405-06.

Even where treaty obligations are not expressly implemented through legislation, Canadian courts will presume that Canadian law complies with Canada's international law obligations. When interpreting Canadian law, courts will generally avoid an interpretation that would place Canada in breach of its international legal obligations.[5] For example, in *Baker v. Canada*

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[5] *See, e.g.*, *R v. Hape*, [2007] 2 S.C.R. 292, para. 53 (Can.); *Baker v. Canada* (Minister of Citizenship and Immigration),

(Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, paras. 69-71 (Can.), the Supreme Court of Canada held that even Canada's unimplemented treaty obligations (in that case the Convention on the Rights of the Child) could be used in assessing whether the Minister of Immigration properly exercised his discretion.[6] Thus, except where a statute expressly deviates from Canada's international treaty obligations, the courts will presume that in enacting domestic laws, the legislature intended to comply with Canada's international obligations. Elizabeth Brandon, *Does International Law Mean Anything in Canadian*

[1999] 2 S.C.R. 817, paras. 69-71 (Can.) (courts should consider relevant international law even when it is not implemented); *Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3 (Can.); *Dunmore v. Ontario* (Attorney General), [2001] 3 S.C.R. 1016 (Can.); *Daniels v. White*, [1968] S.C.R. 517, 541 (Can.).; *Zingre v. The Queen et al.*, [1981] 2 S.C.R. 392, 409-10 (Can.); *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, para. 137 (Can.); *Schreiber v. Canada* (Attorney General), [2002] 3 S.C.R. 269 (Can.).

[6] *See Canadian Foundation of Children, Youth, and the Law v Canada* (Attorney General), [2004] 1 S.C.R. 76 (Can.) (In which the Supreme Court used Canada's obligations under the UN Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, and analogous obligations found in the European Convention on Human Rights and European Court of Human Rights to determine what constitutes reasonable child discipline); *Dunmore v. Ontario* (Attorney General), [2001] 3 S.C.R. 1016 (Can.) (recognizing that International Labour Organization Conventions help establish the scope of freedom of association under section 2(d) of the Canadian Charter of Rights and Freedoms).

Courts?, J. Envtl. L. & Prac. 399, 408 (2001); *R v. Hape*, [2007] 2 S.C.R. 292, para. 53 (Can.).

II. THE PROHIBITION AGAINST FINANCING TERRORISM IS CUSTOMARY INTERNATIONAL LAW, ACTIONABLE IN CANADIAN COURTS.

A. Source of Customary International Law

Customary international law is a binding source of international law, Statute of the International Court of Justice art. 38(2), June 26, 1945, 1945 Can. T.S. No. 7, 33 U.N.T.S. 993, rooted in state practice and a sense of legal obligation rather than express state consent. *See, e.g.*, *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Merits and Judgment, 1986 I.C.J. Rep. 14, paras. 186, 207 (June 27). It evolves slowly over time through consistent, uniform state practice, underpinned by *opinio juris*—a state's belief that it has a legal obligation to conform with such state practice. Ian Brownlie, *Principles of Public International Law* 22 (James Crawford, ed., 8th ed. 2012); *North Sea Continental Shelf* (Ger. v. Neth.), 1969 I.C.J. Rep. 3, para. 76 (Feb. 20). Unlike treaties, which only bind the state parties to the agreement, VCLT art. 27, customary international law is generally universally binding. *See* John Currie, *Public International Law* 100 (2001). Examples of well-established customary international norms include: the prohibitions against slavery, torture, and genocide and the rules on diplomatic immunity. Ian Brownlie, *Principles of Public International Law* 510 (James Crawford, ed., 8th ed. 2012).

B. Customary International Law Prohibits the Financing of Terrorism.

The prohibition against terrorism has crystalized as rule of customary international law. Historically, the international legal response to terrorism had been variegated. Starting in the 1990s, however, state condemnation of terrorism gradually became widespread and unambiguous and there are cogent grounds for concluding that, following the September 11th 2001 terrorist attacks in the United States, a rule of customary international law prohibiting terrorism crystallized. Daniel Hickman, *Terrorism as a Violation of the 'Law of Nations': Finally Overcoming the Definitional Problem*, 29 Wis. Int'l. L.J. 447, 448-49 (2012). Numerous international treaties,[7] regional

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[7] Convention on Offences and Certain Other Acts Committed on Board Aircrafts, *opened for signature* Sept. 14, 1963, 704 U.N.T.S. 219 (186 state parties); Convention for the Suppression of Unlawful Seizure of Aircraft, *opened for signature* Dec. 16, 1970, 860 U.N.T.S. 105 (185 state parties); Convention for the Suppression of Unlawful Acts Against Safety of Civil Aviation, *opened for signature* Sept. 23, 1971, 974 U.N.T.S. 177 (188 state parties); International Convention Against the Taking of Hostages, 17 *opened for signature* Dec. 17, 1979, 11316 U.N.T.S. 205 (176 state parties); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, *opened for signature* Feb. 24, 1988, 1589 U.N.T.S. 474 (178 state parties); Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *opened for signature* Mar. 10, 1988, 1678 U.N.T.S. 201 (166 state parties); Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, *opened for signature* Mar. 10 1998, 1678 U.N.T.S. 201 (155 state parties); Convention on the Prevention and Punishment of Crimes Against Internationally

Protected Persons, Including Diplomatic Agents, *opened for signature* Dec. 14, 1973, 1035 U.N.T.S. 167 (180 state parties); Convention on the Safety of the United Nations and Associated Personnel, *opened for signature* Dec. 9, 1994, 2051 U.N.T.S. 363 (93 state parties); Convention on the Physical Protection of Nuclear Material, *opened for signature* Mar. 3, 1980, 1456 U.N.T.S. 101 (153 state parties); International Convention for the Suppression of Acts of Nuclear Terrorism, *opened for signature* Sept. 14, 2005, 2445 U.N.T.S. 89 (107 state parties); Convention on the Marking of Plastic Explosives for the Purposes of Detection, *opened for signature* Mar. 1,1991, 2122 U.N.T.S. 359 (153 state parties); International Convention for the Suppression of Terrorist Bombings, *opened for signature* Jan. 12, 1998, 2149 U.N.T.S. 256 (169 state parties); Terrorism Financing Convention (187 state parties).

treaties,[8] UN Security Council resolutions,[9] UN General Assembly resolutions,[10] along with general

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[8] Convention on the Prevention of Genocide, *opened for signature* May 16, 2005, C.E.T.S. No. 196 (European States); Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949 (the Organization of American States); Treaty on Cooperation Among the State Members of the Commonwealth of Independent States in Combating Terrorism, June 4, 1999, https://treaties.un.org/doc/db/Terrorism/csi-english.pdf (Commonwealth countries); Regional Convention on Suppression of Terrorism, Nov. 4, 1987, http://treaties.un.org/doc/db/Terrorism/Conv 18-english.pdf (South Asian Association for Regional Cooperation); Convention on the Prevention and Combating of Terrorism, July 14, 1999, http://www.peaceau.org/uploads/oau-convention-on-the-prevention-and-combating-of-terrorism.pdf (Organization of African Unity); Arab Convention on the Suppression of Terrorism, 22 April 1998, https://www.unodc.org/tldb/pdf/conv_arab_terrorism.en.pdf (Arab States); Convention on Combatting International Terrorism, 1 July 1999, http://www.refworld.org/docid/3de5e6646.html (Organization of the Islamic Conference).

[9] *See, e.g.*, S.C. Res. 1373 (Sept. 28, 2001) (condemning the September 11th attacks and calling on members to help bring perpetrators to justice. This resolution followed S.C. Res. 1368 (Sept. 12, 2001), which was hortatory); S.C. Res. 1267 (Oct. 5, 1999) (freezing assets controlled by the Taliban and declaring the suppression of international terrorism is essential for the maintenance of international peace and security); S.C. Res. 731 (Jan. 21, 1992) (recognizing states' right to protect their nationals from terrorism and acknowledging that terrorism causes a threat to international peace and security); S.C. Res. 1566 (Oct. 8, 2004) (reaffirming terrorism as an unjustifiable criminal act); S.C. Res. 1269 (Oct. 19, 1999) (condemning all acts of terrorism as criminal and unjustifiable); S.C. Res. 1624 (Sept. 14, 2005) (condemning strongly all acts of terrorism,

state practice[11] provide credible evidence that the prohibition of terrorism is firmly established as customary international law.

The prohibition against the financing of terrorism forms an integral part of the customary international law prohibition against terrorism. As Daniel Hickman points out, "[c]ertain concrete acts – such as hijacking, or sabotage of civilian aircraft and vessels, taking hostages, intentional targeting of protected persons, extra judicial killings, and torture – clearly violate customary international law." Daniel Hickman, *Terrorism as a Violation of the 'Law of Nations': Finally Overcoming the Definitional Problem*, 29 Wis. Int'l. L.J. 447, 464 (2012). Additionally, "[s]upport for any of these actions is also clearly prohibited under international law". *Id.*

State practice with respect to the Terrorism Financing Convention underscores this assertion. The adoption of the Terrorism Financing

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irrespective of motivation); S.C. Res. 1535 (Mar. 26, 2004) (reaffirming that terrorism constitutes a threat to international peace and security); S.C. Res. 1456 (Jan. 20, 2003) (finding terrorism is one of the most serious threats to international peace and security); S.C. Res. 1822 (June 30, 2008) (expanding the terrorist target list beyond al Qaeda).

[10] *See, e.g.*, G.A. Res. 44/29 (Dec. 4, 1989); G.A. Res. 46/51 (Dec. 9, 1991); G.A. Res. 58/81 (Dec. 9, 2003); G.A. Res. 60/1 (Oct. 24, 2005) (strongly condemning all forms of terrorism); G.A. Res. 49/60 (Dec. 9, 1994).

[11] Daniel Hickman, *Terrorism as a Violation of the 'Law of Nations': Finally Overcoming the Definitional Problem*, 29 Wis. Int'l. L.J. 447, 474-75 (2012).

Convention without a vote by the UN General Assembly, G.A. Res. 54/109 (Feb. 25, 2000), suggests widespread agreement on its content. Laura Halonen, *Catch Them If You Can: Compatibility of the United Kingdom and United States Legislation Against Financing Terrorism with Public International Law Rules on Jurisdiction*, 26 Emory Int'l L. Rev. 637, 645 (2012). 188 states have ratified the Convention;[12] more than 120 states have passed domestic legislation criminalizing terrorist financing;[13] and, among other things, a large number of states have established national financial intelligence units and participate in global inter-governmental networks which have been established to share information on terrorist financing and money laundering.[14] Moreover, UN Security Council Resolution 1373 requires states to "prevent and suppress the financing of terrorist

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[12] United Nations, United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-11&chapter=18&lang=en (last visited June 23, 2017).

[13] Daniel Hickman, *Terrorism as a Violation of the 'Law of Nations': Finally Overcoming the Definitional Problem*, 29 Wis. Int'l. L.J. 447, 474 (2012); Sener Dalyan, *Combatting Financing of Terrorism: Rethinking Strategies for Success*, 1 Def. Against Terrorism Rev. 137, 143 (2008); H Laura Halonen, *Catch Them If You Can: Compatibility of the United Kingdom and United States Legislation Against Financing Terrorism with Public International Law Rules on Jurisdiction*, 26 Emory Int'l L. Rev. 637, 646-47 (2012).

[14] Sener Dalyan, *Combatting Financing of Terrorism: Rethinking Strategies for Success*, 1 Def. Against Terrorism Review 137, 143 (2008).

acts,"[15] and established the UN Security Council's Counter Terrorism Committee. S.C. Res. 1373 (Sept. 28, 2001) Over 190 states have submitted reports to this Committee. United Nations Security Council Counter-Terrorism Committee, *Reports by Member States pursuant to Security Council Resolution 1373 (2001)*, http://www.un.org/en/sc/ctc/resources/1373.html (last visited June 23, 2017).

C. Canadian Courts Enforce Customary International Law.

Customary international law is directly incorporated into Canadian law; no domestic legislation is needed for courts to enforce it in Canada.[16] In *R v Hape*, the Supreme Court of Canada confirmed that "international custom, as the law of nations, is also the law of Canada." [2007] 2 S.C.R. 292, para. 39 (Can.). Customary

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[15] S.C. Res. 1373 (Sept. 28, 2001); *see also UN Office of Drug and Crime, Legislative Guide to the Universal Anti-Terrorism Convention and Protocols* (2004), http://www.unodc.org/pdf/terrorism/TATs/en/1LGen.pdf.

[16] *R v. Hape*, [2007] 2 S.C.R. 292, paras. 39, 40-46 (Can.) (recognizing the principle of respect for the sovereignty of foreign states as customary international law and held that non-intervention and territorial sovereignty principles are incorporated into Canadian common law); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, para. 46 (Can.) (recognizing that *jus cogens* principles of customary international law inform the principles of fundamental justice enshrined in section 7 of the Canadian Charter of Rights and Freedoms and held that based on Canada's domestic and international obligations a person cannot be deported to a place where they will be tortured).

international law does not proscribe or restrict Canadian legislative jurisdiction. *Re Foreign Legations*, [1943] S.C.R. 208, 231 (Can.). The principle of Parliamentary sovereignty permits the legislature to override a rule of customary international law through legislation that expressly derogates from such a rule. *R v. Hape*, [2007] 2 S.C.R. 292, para. 39 (Can.). In practice, however, certain rules of customary international law influence the interpretation of the constitution, thus allowing it indirectly to trump express legislation to the contrary. *Id.* paras. 53, 56, 58; *see also Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 125, 136 (Can.). In any event, states rarely derogate from fundamental rules of customary international law. Honourable Justice Louis LeBel, *A Common Law of the World? The Reception of Customary International Law in the Canadian Common Law*, 65 U. New Brunswick L.J. 3, 18 (2015). Accordingly, customary international law remains an important part of Canadian law and informs the interpretation of Canadian constitutional laws and legislation, as well as the development of the common law. *R v. Hape*, [2007] 2 S.C.R. 292, para. 39 (Can.).

Courts of common law jurisdictions, including Canada, have a long tradition of developing private law obligations based on customary international law.[17] Additionally, Canadian courts have

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[17] *See, e.g.*, 1 William Blackstone, *Commentaries on the Law of England*, 273 (JB Lippincott Co 1893) (noting the discussion of how commercial law is regulated by *lex mercatoria*—laws by which all nations agree and take notice of); *Holt Cargo Systems Inc v. ABC Containerline NV (Trustees of)*, [2001] 3 SCR 907

recognized that the international customary norms of *lex mercatoria* can give rise to a cause of action. *Balm v 3512061 Canada Ltd.* (2003), 327 A.R. 149 (Can. Alta. Q.B.). No civil claims alleging a breach of public customary international law norms have yet been successfully advanced in Canada. *See Araya v Nevsun Resources Ltd*, 2016 BCSC 1856, para. 445 (Can.). However, a recent decision of the British Columbia Supreme Court held that a civil claim based in customary international law is arguable in Canadian courts. *Id.* paras. 458, 484. Further, other Canadian court decisions including the Federal Court of Canada's have confirmed that civil causes of action may be derived from customary international law provided jurisdiction is otherwise established.[18]

(Can.) (addressing how common law courts have applied customary international law relating to maritime commerce).

[18] *See, e.g., Bil'In (Village Council) v. Green Park International Inc*, 2009 QCCS 4151, paras. 175-176 (Can.). Other cases emphasize the same. For example, in *Mack v. Canada* (Attorney General) (2002), 60 O.R. 3d 737 (Can. Ont. C.A.), the plaintiffs sued the Canadian government for having allegedly violated the customary international norm against racial discrimination. At issue was the legality of certain Canadian statutes that, until 1947, unfairly taxed the entry into Canada of Chinese immigrants. The Court of Appeal for Ontario ultimately found that, during the relevant period, there did not exist an international norm prohibiting racial discrimination, and, furthermore, that if such a customary norm had indeed existed, it would have been rendered inoperative due to the primacy of the impugned legislation. Notwithstanding the Court's ultimate findings of law, the overall thrust of its analysis is significant. By undertaking a searching analysis of customary international law as it existed during the relevant

D. A Civil Suit against a Corporation for Violations of the Terrorism Financing Convention Could be Brought in Canadian Courts Based on Customary International Law.

Canadian courts have presumptive territorial jurisdiction over corporations resident in Canada. Corporations can be held liable under domestic criminal law for international crimes, such as, war crimes and crimes against humanity, Crimes Against Humanity and War Crimes Act, S.C. 2000, ch. 24, §§ 6(1), (3)-(4), and terrorism, including financing terrorism. Criminal Code, R.S.O. 1985, ch. C-46, § 83.01(1)(a) (Can.); PCTFA. Corporations could also be held civilly liable for such acts.[19]

As stated above, breaches of international law may form the basis of a civil claim against such a

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period, the Court signalled that it would have been possible to derive a private cause of action for discrimination from customary international law). Similarly, in *Abdelrazik v Canada* (Attorney General), [2010] 1 F.C.R. 267(Can.), the plaintiff brought a tort claim for damages against the Canadian government based on the customary international law rule prohibiting of torture. The Federal Court dismissed the motion to strike the claim and stated that, "the linkage between international law and domestic law is evolving" and that there is support in both "academic opinion and jurisprudence which ... leaves open the possibility that courts may, in the proper circumstances, recognize a cause of action for violation of customary international human rights". *Id.* para. 53.

[19] *See Araya v. Nevsun Resources Ltd*, 2016 BCSC 1856 (Can.); *Bil'In (Village Council) v. Green Park International Inc*, 2009 QCCS 4151 (Can.); *Mack v Canada* (Attorney General) (2002), 60 O.R. 3d 737, (Can. Ont. C.A.).

corporation. In *Araya v Nevsun Resources Ltd*, 2016 BCSC 1856 (Can.), the plaintiffs (Eritrean refugees) brought a civil action against British Columbia mining company Nevsun Resources Ltd. for, among other things, alleged breaches of customary international law. The Supreme Court of British Columbia dismissed Nevsun's motion to strike out the plaintiffs' customary international law pleadings, finding a customary international law claim is arguable in Canadian courts. *Id.* paras. 428-29. Given that the prohibition against financing terrorist acts is an integral part of the customary international law rule prohibiting terrorism, a civil claim could be brought in Canadian courts against a corporation resident in Canada for allegedly financing terrorism.

CONCLUSION

The prohibition against the financing of terrorism is both a rule of treaty law and a central component of the customary international law norm prohibiting terrorism. Customary international law obligations are automatically incorporated into the common law of Canada and may give rise to a cause of action in Canadian courts. Therefore, although Canadian legislation implementing Canada's obligations under the Terrorism Financing Convention, does not expressly establish a civil cause of action, plaintiffs who have suffered harm caused by a corporation involved in financing terrorist acts could bring a civil action against such an entity in Canadian courts based in customary international law.

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